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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Redevelopment of Spectrum to)
Encourage Innovation in the)
Use of New Telecommunications)
Technologies)

ET Docket No. 92-9

FURTHER COMMENTS OF TELOCATOR

**TELOCATOR, THE PERSONAL
COMMUNICATIONS INDUSTRY
ASSOCIATION**

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January 12, 1993

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FURTHER COMMENTS OF TELOCATOR

Telocator, the Personal Communications Industry Association, herewith submits its comments in response to the First Report and Order and Third Notice of Proposed Rulemaking ("First Report and Third Notice") in the above captioned proceeding.¹ As detailed below, Telocator offers several important refinements to the Commission's transition plan for introducing new Emerging Technologies ("E.T.") while safeguarding the legitimate interests of existing 2 GHz microwave users. These consensus recommendations are designed to expedite the delivery of new services and minimize the costs and burdens of the relocation process for all concerned.

I. SUMMARY

As an organization representing both prospective Emerging Technologies service providers and companies holding microwave licensees in the 2 GHz band, Telocator has sought to ensure a fair and equitable process for the introduction

¹ FCC 92-437 (released October 16, 1992).

of new services and relocation of existing services. In earlier phases of this proceeding, the association offered a detailed consensus proposal for an orderly transition plan to accomplish both goals. These recommendations underlie much of what the Commission has already adopted in this docket.

After reviewing the First Report and Third Notice, Telocator suggests further refinements in the Commission's rules to promote timely introduction of new services and reduce the potential for controversies associated with the transition plan. Specifically, Telocator details in these comments a carefully crafted set of guidelines to govern the negotiations between incumbent microwave licensees and new Emerging Technologies service providers. In addition, a mechanism for dispute resolution is offered for Commission consideration.

Telocator also suggests other important modifications to the Commission's rules to (1) address special problems associated with the deployment of unlicensed devices; (2) establish priorities for access to the government spectrum at 1710-1850 MHz; and (3) use tax certificates to facilitate relocation of existing operations. Each of these points is discussed in detail below.

II. THE COMMISSION'S TRANSITION PLAN INCORPORATES SEVERAL BASIC PRINCIPLES ADVOCATED BY TELOCATOR AND INVITES COMMENT ON A NUMBER OF IMPORTANT UNRESOLVED ISSUES

In response to the Commission's First Notice of Proposed Rulemaking,² Telocator presented several governing principles for implementing Emerging Technologies consistent with the interests of existing 2 GHz microwave licensees. Telocator's goal was to strike an appropriate balance designed to promote the rapid introduction of new services without disruption or costs to incumbent licensees. Specifically, Telocator advocated a program that included the following basic elements:³

- A transition plan framework should be utilized rather than merely providing for current users' primary status to expire on a fixed date. An incumbent microwave licensee should be able to continue its operations until an emerging technologies entrant identifies appropriate substitute facilities and agrees to reimburse it for the costs of relocation. The new provider would be required to furnish the incumbent microwave licensee with notification of the proposed relocation and, upon request, provide a compensation commitment and detailed transition plan delineating the engineering, financial, regulatory, and timing concerns raised by the proposed relocation.
- No microwave users should be required to cease 2 GHz operations until suitable alternative facilities are implemented and tested. Despite the technical feasibility of relocating most fixed microwave services currently deployed in the 1.85 to 2.20 GHz band, in cases where fully reliable relocation is impossible or highly impractical, no microwave user should be

² Notice of Proposed Rulemaking, ET Docket 92-9, 7 FCC Rcd 1542 (1992).

³ See First Report and Third Notice, ¶ 23.

compelled to relocate unless and until the new user can provide suitable alternative facilities.

- Government spectrum at 1710-1850 MHz should be considered as a potential relocation destination for current 2 GHz licensees. Utilizing government spectrum to the maximum extent possible consistent with government need may alleviate many of the problems associated with relocating incumbent licensees to reliable alternative spectrum homes.
- Spectrum sharing should be used initially and whenever feasible. Prompt deployment of new services depends largely on the ability of incumbent users and new entrants to co-exist. In addition, self-interest dictates sharing whenever possible to minimize costs. Relocation should only be sought where co-existence is not a viable option.
- 2 GHz microwave and emerging technology licensees should be free to negotiate mutually acceptable agreements for spectrum accommodation or relocation. Spectrum needed for emerging technologies may be made available faster if the market, rather than regulatory fiat, is permitted to govern this process.
- Tax certificates should be used to encourage accommodation of emerging technologies. Commission-issued tax certificates could remove economic disincentives for incumbent users to relocate in situations where migration would otherwise be deterred by financial consequences.

The Commission's proposed transition plan, as set forth in its First Report, explicitly adopts many of these principles as appropriate and sensible means to reallocate incumbent 2 GHz operations.⁴ The Report articulates guidelines for an emerging technology licensee to reach an agreement or to involuntarily require an incumbent fixed microwave licensee to relocate that are derived directly from Telocator's

⁴ First Report and Third Notice, ¶ 23.

enumerated principles. Specifically, the Commission's plan provides for:

- Full Cost Compensation. The Commission's proposed rules guarantee relocating 2 GHz licensees full reimbursement for their relocation expenses. In the event that voluntary negotiations prove fruitless at the expiration of a fixed period, an emerging technology provider may request involuntary relocation of the incumbent, subject to the condition that the new provider assume the relocation costs.⁵
- Comparable alternative facilities. The First Report emphasizes that no relocation will be required unless and until the emerging technologies entrant demonstrates that a comparable alternative facility is available and tested for comparability to the existing licensee's 2 GHz system.⁶
- Relocation of all 2 GHz licensees except public safety and special emergency radio services operations. The First Report exempts only those 2 GHz fixed microwave operations licensed to the public safety and special emergency radio services from involuntary relocation. However, even those licensees are encouraged to engage in negotiations for voluntary relocation.⁷

Despite progress made by the Commission towards establishing a comprehensive framework that incorporates many of the aforementioned principles, several important issues remain unresolved. The Third Notice solicits further comment on four aspects of the Commission's proposed transition plan: (1) An appropriate definition for "comparable alternative facilities;" (2) use of negotiated rulemakings or other

⁵ Id., ¶ 24.

⁶ Id.

⁷ Id., ¶ 26.

processes to resolve disputes over involuntary relocations or comparability of service; (3) length of time periods for voluntary relocations; and (4) use of tax certificates to encourage relocations. As set forth below, Telocator has some additional recommendations concerning these and related issues involved in the redevelopment of spectrum for emerging technologies.

**III. THE COMMISSION SHOULD ESTABLISH A TRANSITION
PROCESS THAT WILL MINIMIZE POTENTIAL AREAS OF
CONTROVERSY AND ENSURE THE TIMELY AVAILABILITY
OF EMERGING TECHNOLOGY SERVICES**

Telocator believes that the Commission's transition plan for relocation of incumbent licensees should be further refined to specify a process and procedures that can minimize disputes and hasten the availability of new services. Absent such guidance, the negotiation and relocation process could be rife with controversies over issues such as the adequacy of cost compensation and the comparability of facilities that will add to both the expense and delays associated with the introduction of Emerging Technologies. The Commission can avoid many such unnecessary impediments by prescribing the process for effectuating the transition plan and providing further guidance concerning the critical issues that must be faced by the affected parties. Telocator's suggestions are detailed below.

**A. Relocation of 2 GHz Microwave Licensees
Should Occur as Promptly as Possible Under
Prescribed Commission Procedures**

As a threshold matter, the Commission's rules already require that 2 GHz licensees be fully compensated and be provided with comparable alternative facilities.⁸ Where an Emerging Technologies licensee satisfies those conditions, there can be no justification for unnecessary delays in completing the relocations. Given the rules' absolute provisions that no incumbent licensee need ever move if the relocation will cause technical or economic harm, the Commission should establish the shortest possible time frame for voluntary relocations. Under these conditions, a transition period serves no evident purpose other than to provide incumbents a more extended period during which they are in a position to negotiate for their "early" relocation at a premium cost. Any such delays and resulting increases in the cost of new ET services deployed in the spectrum would clearly be inimical to the public interest.

Telocator further recommends that the Commission prescribe the following procedures for minimizing disputes over

⁸ See 47 C.F.R. § 21.50. Further, incumbents are provided the right to be moved back to their original facilities (at the expense of the Emerging Technologies licensee) if the new facilities prove incapable, in actual operation, of providing comparable service.

compliance with such requirements and addressing special needs of new services for timely access to 2 GHz spectrum.

**1. E.T. Providers and 2 GHz Licensees
Should Have A Choice of Three Alternatives
for Satisfying the Relocation Requirements**

It is clear from the First Report and Third Notice that a relocation may be effected where the emerging technologies provider guarantees payment of all relocation costs, completes all activities necessary for implementing the new facilities, and builds and tests the new facilities for comparability to the incumbent's existing system.⁹ Although the FCC details these steps in the context of an involuntary relocation, there is nothing in the text to suggest that such "turn key" replacements would not be equally acceptable -- and, indeed, required -- in the case of a voluntarily negotiated relocation.¹⁰

Telocator submits that the chain of events described by the Commission represent only one of several conceivable mechanisms for satisfying the transition requirements for provision of cost compensation and comparable alternative facilities. Indeed, it would appear to be reasonable for the

⁹ First Report and Third Notice, ¶ 24.

¹⁰ Indeed, in its discussion of tax certificate issues the agency appears to contemplate authorizing any allocation of relocation costs and responsibilities that is "voluntarily agreed to by the parties." Id., ¶ 37.

FCC to leave it to the interested parties themselves to negotiate the division of responsibilities attendant to the relocation, so long as those criteria are satisfied. Although infinite variations are possible, the generic alternatives as to which the parties should be permitted to assent may be classified as follows:

- **Construction of "turn key" facilities.** The parties agree that the emerging technologies entrant will, as described by the FCC, itself complete the construction and related activities necessary for bringing the new facilities into service. After testing, the new installation would be handed over to the 2 GHz licensee in exchange for the relinquishment of its old system and frequency.
- **Reimbursement of reasonable expenses incurred.** The parties agree that the incumbent licensee will assume the responsibility for relocating its microwave facilities, with the E.T. provider undertaking to reimburse the licensee for all reasonable and necessary expenses it incurs.
- **Up front cost cash compensation.** The parties agree up front upon the costs associated with relocating the incumbent licensee to a new spectrum home or to alternative facilities and the emerging technologies entrant provides that licensee with monetary compensation for those costs. The 2 GHz licensee would then effectuate the relocation itself.

Each of the foregoing scenarios can be designed to meet all of the FCC's core transition requirements. Because numerous factors might cause the parties to prefer one or the other,¹¹ the Commission should not foreclose any of these

¹¹ See, e.g., Utilities Telecommunications Council, Petition for Clarification and/or Reconsideration, ET Docket No. 92-9 ("UTC Petition") (filed Nov. 30, 1992) at 5-6 (util-
(continued...))

options. Rather, the public interest would be served and the transition process expedited if the parties are given the maximum flexibility to structure their relocation agreements in this manner within the parameters established by the agency.

**2. The Transition Process Should Be Required
 To Follow Established and Predictable
 Procedures That Will Facilitate Settlements**

In order to initiate the relocation process, Telocator recommends that a E.T. provider first transmit a "Notice of Request for Accommodation" to affected 2 GHz licensees. The purpose of the Notice and the required response of the microwave licensee would be to exchange information necessary to begin negotiation of the issues attendant to the relocation. The Notice and/or response should include the following information:

- In the Notice, the Emerging Technologies provider must specify the microwave frequencies and their locations for which accommodation is sought.
- The Notice would state that the microwave licensee is entitled to either: 1) request that the E.T. provider itself prepare a transition plan and

¹¹(...continued)
ities' requirements counsel that the incumbents have the right "to engineer, build and test the replacement facilities itself"); Pacific Telesis Group, Petition for Clarification or Reconsideration of First Report and Order, ET Docket No. 92-9 (filed Nov. 30, 1992) at 2-3 ("many existing fixed microwave licensees . . . have well-qualified technical and engineering staffs and would prefer to do relocation work 'in house' . . .").

compensation commitment; or 2) prepare its own transition plan and cost estimates for transmittal to the E.T. provider.

- In its response, the 2 GHz licensee would be obligated to advise the E.T. provider of its choice regarding allocation of the responsibilities for preparation of the transition plan and relocation of the microwave facilities.
- The response should also include all information and specifications necessary to determine the technical performance of the 2 GHz licensee's existing facilities so that the benchmark against which the new system must be designed can be established. (Such information should be easily obtainable through either the manufacturer of the licensee's microwave equipment or the engineering firm that designed its system.)

Once the relevant information has been exchanged, the parties would proceed to negotiate the allocation of relocation responsibilities and resolve any differences or disputes concerning the details of the plan and the costs involved. Implementation of the plan would begin as soon as agreement is reached on these details. To facilitate this negotiation process, the FCC should:

- Make clear that the required "cost compensation" includes the replacement cost of existing facilities, including all expenses necessary to bring the new system into operation, where the new facilities are deemed to be comparable alternatives; and
- Declare that the E.T. providers' showing that it proposes the installation of facilities whose specifications meet or exceed those of the incumbent licensee's existing facilities and demonstration through reliable engineering documentation that comparable performance can be expected from the new system under anticipated field conditions will establish a rebuttable presumption that its obligation to make available "comparable alternative

facilities" would be satisfied by implementation of that plan.

Telocator believes that reliance upon these objective criteria should go a long way towards minimizing the prospect for disputes between new providers and existing licensees.

**3. The Procedures for Addressing Transition
Plan Controversies Must Be Carefully
Circumscribed To Promote Expeditious
Settlements**

Telocator submits that the process of resolving relocation disputes must satisfy two fundamental criteria. First, the process must minimize the impositions on limited agency resources. Second, it must contain strong incentives for prompt settlement. The following procedures should reasonably accommodate these concerns.

- **Neutral mediation.** Parties unable to reach a mutual agreement concerning the transition plan and related issues would be required to seek outside mediation. The transition plan, the estimated costs of relocation, and the particular area of dispute would be submitted to evaluation by a mutually acceptable, neutral expert. This independent review would be a pre-condition to seeking FCC intervention.
- **FCC intervention as a last resort.** The Commission would serve only as the forum of last resort for resolving disputes about the relocation plans or parties' compliance with the transition procedures.
- **Loser pays costs.** The losing party before the FCC would be required to pay the full costs of the dispute resolution process, including those incurred

by the "winning party" and by the agency.¹² This requirement would penalize dilatory tactics while at the same time offering incumbents protection against pressure to accept a demonstrably incomplete or inferior relocation proposal.

This tiered process can be expected to encourage the parties either to agree initially or, as a minimum, to accept the expert's impartial evaluation and to discourage further appeals to the agency. As such, its adoption by the Commission should serve to accelerate the introduction of new services for the public.

IV. ADDITIONAL SPECIAL ISSUES SHOULD ALSO BE ADDRESSED

A. The Rules Should Recognize the Special Considerations Associated With Unlicensed Devices

The introduction of unlicensed E.T. devices present special problems for the Commission, E.T. providers and 2 GHz licensees. The nature of unlicensed devices contemplates that they will be deployed in a flexible, and frequently mobile, environment without causing harmful interference to licensed operations on the same or adjacent frequencies. Although it may be relatively easy to find at least some interference-free environments permitting the operation on a spectrum sharing basis of certain types of unlicensed devices that are relatively fixed in their operation, the more

¹² Recovery of the FCC's expenses for dispute resolution may require legislative authorization.

consumer-oriented and highly portable devices intended for this band cannot be broadly introduced into the marketplace until the band is cleared of 2 GHz microwave licensees.

It follows that, in order to facilitate the early introduction of unlicensed E.T. devices, relocation of 2 GHz licensees in the unlicensed device band should commence immediately. The American Petroleum Institute has suggested that all microwave licensees in the unlicensed device bands could be relocated outside the Emerging Technologies band within a one year transition period.¹³ Telocator strongly supports such an expedited schedule.¹⁴

B. Exempt Microwave Facilities and Those That Are Not Technically Compatible With Higher Bands Should Be Given Priority Access to Government Spectrum

A preference for access to 1710-1850 MHz government spectrum should be accorded for relocation of microwave facilities that cannot technically be relocated to higher bands and for relocation of exempt 2 GHz facilities. The

¹³ Comments of American Petroleum Institute, Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Docket No. 90-314 (filed Nov. 9, 1992) at 16-17.

¹⁴ However, Telocator opposes the requests of the Utilities Telecommunications Council and others that would substantially expand the public safety category. See UTC Petition at 6-9. Any such increase in the number of exempt licensees would be likely to seriously impede the introduction of new technologies and services into the unlicensed band.

desirability of this spectrum relative to other bands may provide an inducement for some 2 GHz licensees not to exercise their rights to refuse relocation. As a result, the availability of such an alternative home for these licensees will facilitate band clearing and hasten the introduction of new services.

**C. Tax Certificates Should Be Used To
Encourage and Facilitate Relocation
of 2 GHz Microwave Licensees**

The Commission seeks further comment on the desirability of and authority for issuing tax certificates to "remove a potential financial disincentive to relocation" of existing 2 GHz licensees.¹⁵ Telocator continues to support the use of tax certificates in this context and submits that their issuance would be entirely lawful and appropriate in these circumstances.¹⁶

Although the Commission has traditionally issued tax certificates primarily in the context of radio broadcasting, commenting parties have advanced cogent reasons for extending Commission grants of tax certificates to incumbent 2 GHz

¹⁵ First Report, ¶ 37.

¹⁶ See § 26 U.S.C. § 1071, which provides for postponement of gains on certain sales or exchanges of property if such sales are certified by the FCC to be "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission, with respect to the ownership and control of radio broadcasting stations."

licensees in the situation at hand in order to promote the FCC's transition and relocation policies. As GTE noted in its opening comments,¹⁷ the Commission itself has recognized that "dramatic and substantial changes" in the telecommunications industry in the years since the language of Section 1071 was first enacted support an expansive construction of "radio broadcasting" to facilitate the Commission's pro-competitive policies in areas of communications outside the confines of broadcasting.¹⁸ Such a broad interpretation would particularly be warranted here.

Issuance of tax certificates to relocating microwave licensees would be fully consistent with the purposes of both the Communications Act and the Internal Revenue Code. First, the Commission has broad authority to fulfill its statutory mandate, which includes the promotion of new technologies.¹⁹ Second, because the reallocation of 2 GHz spectrum to Emerging Technologies means that incumbent 2 GHz licensees must, in most cases, convert their facilities and relocate to accommodate the new services, the new rules in practical

¹⁷ Comments of GTE, Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9 (filed June 5, 1992) at 19-22.

¹⁸ Id. at 20-21 (quoting Telocator Network of America, 58 RR 2d 1443 (1985), recon. dismissed, 1 FCC Rcd 509 (1986)).

¹⁹ See e.g., 47 U.S.C. §§ 151, 154, 157.

effect work an involuntary exchange, which is recognized as a non-taxable event in the Internal Revenue Code.²⁰

Accordingly, Telocator submits that an expansive construction of the FCC's tax certificate authority is clearly sustainable here. Issuance of tax certificates to relocating 2 GHz microwave licensees will do much to facilitate the Commission's plans for an orderly transition essential to the prompt redevelopment of spectrum for Emerging Technologies.

V. CONCLUSION

For the foregoing reasons, Telocator urges the Commission to prescribe the process described above to govern the transition of microwave licensees from the 2 GHz bands. In this manner, the FCC can both facilitate and encourage the

²⁰ See generally, I.R.C. § 1033(a). In the cable context, the Commission has awarded tax certificates to telephone companies that were forced to divest themselves of cable systems as a result of the cable cross-ownership rules. Continental Telephone Corp., 43 F.C.C.2d 827, 838 (1973), recon., 51 FCC Rcd 284 (1975). Such a result is consistent with federal income tax policy not to recognize the tax consequences of involuntary events.

early introduction of publicly important new E.T. services consistent with the legitimate interests of existing 2 GHz microwave licensees.

Respectfully submitted,

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